IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 684.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA AND JOSEPH HAYES, THOMAS HAYES, HELEN HAYES AND MARY HAYES, MINORS, BY MARY LORDAN, GUARDIAN OF THEIR PERSONS AND ESTATES,

Plaintiffs in Error,

vs.

JAMES ROLPH COMPANY AND GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, A CORPORATION,

Defendant in Error.

PETITION FOR A REHEARING

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PETITION FOR A REHEARING.

Plaintiffs in error respectfully pray for a rehearing of the decision of this court made in the above entitled proceeding on February 25 of the present term, upon the ground that the court failed to pass

upon two important assignments of error necessary to decision in the case.

This case was argued as a companion case to No. 366, *State of Washington* vs. *Dawson*, which latter case involved only the issue dealt with in the opinion of the court written for the two cases jointly. It may be that the opinion was prepared for the latter case and that the court overlooked the fact that the present case contained two additional questions not there raised. These additional issues were briefed by the writer and also stressed upon oral argument.

Both cases dealt with the applicability of state workmen's compensation acts to port, harbor and other local maritime workers. In each case the applicability of the state law was asserted under the act of congress of June 10, 1922, amending sections 24 and 256 of the Judicial Code, which act was by a majority of this court held unconstitutional in its decision herein. We defer to the apparently fixed determination of the court upon the invalidity of the act of congress and do not urge this contention again.

The two assignments of error involved in the instant case not present in the *Dawson* case are:

(1) That a state workmen's compensation act can be applied in all cases of fatal injury (of which the present is one) for the reason that the maritime law makes no provision for fatal injuries. There is, therefore, no provision of the maritime law with which a state workmen's compensation act can come in conflict.

(2) The California Workmen's Compensation Act may be applied in the instant case as an elective workmen's compensation act, accepted by the voluntary contract of the parties, even though not applicable as a compulsory statute.

We especially urge the court to pass upon the latter contention. The highest courts of six states have sustained the application of elective state workmen's compensation acts to maritime injuries. But one, the court below in the present case, has denied it. The affirmance of the decision below without discussion of this ground unsettles the law of all the maritime states possessing elective, or compulsory and elective, compensation statutes and creates confusion. The effect is seriously to embarrass the determination of claims arising from personal injuries sustained by harbor workers in all such states.

The present state of the law governing injuries sustained by stevedores, repairmen, drydock workers and other port and harbor workers is that their rights are governed by the rule of *The Osceola*, 189 U. S. 158, a rule which was never intended for port workers, but was created solely to fit the needs of seamen and those who travel with vessels from port to port and country to country. The rule is wholly inapplicable by nature to resident workers and is incomparably inferior in its protection and natural justice to the modern and more humane legislation prevailing in most maritime states. It also places both such workers and their industries at a disad-

vantage as compared to all other industrial workers in the same ports.

Realizing the insufficiency of the rule of *The Osceola* to meet modern conditions, Congress, by section 33 of the Merchant Marine Act of 1920 (the validity of which has just been sustained by this court in *Panama R. R. Co.* vs. *Andrew Johnson*, decided April 7, 1924), has relieved seamen from the maritime rule by giving them the option of recovery under the Federal Employers' Liability Act. This relief does not extend to longshoremen or other port workers. We now have the anomaly that seamen, for whom alone the rule of *The Osceola* was designed, are relieved from it while stevedores, repairmen and other port workers to whom it is logically inapplicable have been forced under it by certain court decisions with no relief until congress acts, unless relief can be obtained by their own voluntary agreement.

In California and many other maritime states, employers and employees in maritime work have endeavored to obviate this result by voluntarily adopting the state workmen's compensation acts as the measure of their rights and liabilities. This is particularly desirable because such workers are now subject to the state law for all injuries occurring *upon land* in the course of their maritime employment; *State Industrial Commission of New York* vs. *Nordenholt Corporation*, 259 U. S. 263. It is a convenient step to extend the same law to cover the whole employment. This voluntary adoption of the state

law has been sanctioned, as stated, by the highest courts of six states, the cases being cited in the footnote.[1] We believe it to be expressly sanctioned by the decision of this court in *Grant Smith-Porter Ship Co. vs. Rohde*, 257 U. S. 469. We respectfully submit that this court should end the uncertainty created upon this subject by its decision in the instant case, by granting a rehearing and definitely determining the question.

The facts of the present case are that one Eugene Hayes, a longshoreman, was killed on September 5, 1922, while assisting in unloading a vessel in San Francisco harbor, the injury occurring upon the vessel. A death benefit was granted his minor children by the California Industrial Accident Commission under the State Workmen's Compensation Act. The defense of conflict with the maritime law was overruled upon the grounds (1) that the act of congress of June 10, 1922, saved the case; (2) the case being one of fatal injuries, for which the maritime law has no provision, no conflict exists with the maritime law; (3) the state statute should be applied as an elective act. This decision was reversed by the Supreme Court of California upon all three grounds, which decision was sustained by this court upon the first ground only.

[1] *Berry vs. Donovan & Sons*, 120 Me. 457, 115 Atl. 270; *Kennerson vs. Thames Towboat Co.*, 89 Conn. 307, 94 Atl. 372; *Bockhop vs. Phoenix Transit Co.* (N. J.), 117 Atl. 624; *Southern Surety Co. vs. Stubbs* (Tex.), 199 S. W. 343; *Travelers Insurance Co. vs. Bacon* (Ga.), 119 S. E. 458; *West vs. Kozer* (Ore.), 206 Pac. 542.

ARGUMENT.

We here summarize briefly the argument made in the writer's brief upon each of the two last contentions.

I.

THE MARITIME LAW CREATES NO RIGHT OF ACTION FOR DEATH. THE STATE IS, THEREFORE, FREE TO PROVIDE THE SUBSTANTIVE LAW WHICH SHALL GOVERN FATAL MARITIME INJURIES, WHETHER THAT LAW BE IN THE NATURE OF A LORD CAMPBELL'S ACT OR A WORKMEN'S COMPENSATION ACT.

This contention is raised in our second assignment of error (rec. page 26). It was stated more narrowly in plaintiff in error's brief, page 61, and was restated at the oral argument in its broadest scope. It is not raised for the first time in this petition.

All the decisions of this court upon the subject concede that the maritime law has never provided a remedy for fatal injuries occurring upon navigable waters of the United States.

American Steamboat Co. vs. *Chace*, 16 Wallace, 522;
The Harrisburg, 119 U. S. 199;
The Corsair, 145 U. S. 335.

As a result this court has repeatedly sanctioned the application of state death statutes (Lord Campbell's Acts) to maritime injuries.

Southern Pacific Co. vs. *Jensen*, 244 U. S. 205;
Western Fuel Co. vs. *Garcia*, 257 U. S. 233.

If a state statute creating a right of action for tortious death be valid, why may not a state statute creating a right of action upon workmen's compensation principles for the same death be equally valid? The constitution does not fix any doctrine of substantive law to be applied in the maritime field. It merely confers jurisdiction.

Panama R. R. Co. vs. *Johnson, supra*, decided April 7, 1924, by this court.

The question of what the substantive law shall be is therefore a legislative and not a constitutional question. Given a power in the states to make applicable their state death statutes, it would seem that the states would have equal power to apply their more modern workmen's compensation legislation under the same circumstances. The common law rule of indemnity is no more sacred than modern statutory reforms now adopted by forty-two of our forty-eight states.

The similarity or lack of similarity of the state rule to principles of maritime law is immaterial. In its decision in *Knickerbocker Ice Co.* vs. *Stewart*, 253 U. S. 149, in the instant case, decided February 25, 1924, and in *Panama R. R. Co.* vs. *Johnson*, decided April 7, 1924, this court reaffirms the power of congress to supplant the characteristic rules of the maritime law with different rules drawn from other systems, expressly including a workmen's compensation act. To the extent that the states can make any rule applicable, the same

choice of principles would inevitably follow. Moreover, the underlying principle of compensation legislation is closer in nature to the rule of *The Osceola* than that of indemnity for tort, as both are based upon a limited insurance, irrespective of fault, and not upon tort.

The Osceola, 189 U. S. 158;
New York Central R. R. Co. vs. *White*, 243 U. S. 188;
Constitution of California, Art. XX, Sec. 21.

We do not pass over the fact that *Southern Pacific Co.* vs *Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co.* vs. *Stewart*, 253 U. S. 149, were both cases of fatal injuries and in both the State Compensation Act was held inapplicable. In neither did the court explain why the state law could not be applied to death cases. The only explanation the writer has ever seen suggested is that it was the intention of the court to hold that the states can not interfere with the movement of commerce in interstate and foreign transportation by water by making a rule of their own applicable to injuries sustained by persons engaged in such transportation. This notwithstanding the fact that similar interference with interstate and foreign commerce by rail by the states has received the approval of this court. *Second Employers' Liability* cases, 223 U. S. 1; *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co.* vs. *Western Maryland R. R. Co.*, 242 U. S. 311. This interpretation of

the *Jensen* and *Knickerbocker* cases is supported by the language of the opinions therein.

This court has, however, later modified the *Jensen* and *Knickerbocker* cases and changed the ground of its decision from *interference with commerce* to *conflict with applicable rules* of the maritime law; *State Industrial Commission of N. Y.* vs. *Nordenholt Corporation*, 259 U. S. 263, and the instant case. In the *Nordenholt* case, this court stated:

> "Consequently, when the compensation act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law."

In *Grant Smith-Porter Ship Co.* vs. *Rohde, supra*, this court said:

> "Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law can not materially affect any rules of the sea whose uniformity is essential."

In *Panama R. R. Co.* vs. *Johnson, supra*, this court said:

> "As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character."

In the *Nordenholt* case a stevedore was injured upon the dock while performing maritime service. The court held the State Compensation Act appli-

cable because it did not conflict with maritime law in such case, notwithstanding the fact that the interference with commerce by the state law was just as great where the injury occurred on the dock as where it occurred on the vessel in the course of the same stevedoring service.

The basis of exclusion of state workmen's compensation acts as now stated in the decisions of this court is that such acts are excluded only where they come in conflict with an applicable rule of the maritime law. There being no such rule in death cases, there is no conflict.

II.

THE STATE COMPENSATION ACT MAY BE APPLIED IN THE PRESENT CASE AS AN ELECTIVE ACT.

As stated above, the advantage of uniformity of regulation of port and harbor employments, by which the same law may be made applicable whether the injury occurs upon the vessel or upon the wharf, has led port and harbor industries generally to adopt the state acts as the measure of their rights and duties by voluntary contracts with their workmen to this effect, such voluntary contracts being the basis of all elective compensation acts. Further elements of public policy inducing port and harbor industries to seek this course are strikingly set out in the *amicus curiae* brief filed in this proceeding on behalf of American Ship Builders, Inc., New York, and New Jersey Dry Dock Association and Longshoremen's Union of America. The desire of ship builders is there pointed out to have their workmen under the same law when making repairs upon old ships tied up at their docks as when engaged in new ship construction; of brick yards and other local manufacturers who load and unload barges with their own men, to have them under one law throughout; of dry dock owners to be under one law for their whole service; or lumber and coal dealers to be under one law for the entire service performed by their men in unloading and distributing coal, etc. Attention is also called to appendices "A" and "B" of said brief, containing reports of the senate and house committees, reporting the bill

which later became the act of congress of June 10, 1922, which are equally important in showing the strong public policy of permitting voluntary election of state workmen's compensation acts by employers and employees in local maritime work.

An elective workmen's compensation act is one which is made applicable to the situation of the parties by their voluntary choice or adoption of the statute in place of the earlier law, which choice is manifested in one or more of the modes prescribed in the statute. It is a species of implied contract. The constitutionality and effectiveness of such elective acts have been sustained universally by the state courts and have been upheld by this court in *Jeffrey Mfg. Co.* vs. *Blagg*, 235 U. S. 571; *Hawkins* vs. *Bleakly*, 243 U. S. 210; *Middleton* vs. *Texas Power & Light Co.*, 249 U. S. 152.

The validity of election of state workmen's compensation act to cover maritime injuries has been sustained in *Grant Smith-Porter Ship Co.* vs. *Rohde*, 257 U. S. 469; *Berry* vs. *Donovan & Sons*, 120 Me. 457, 115 Atl. 250; *Kennerson* vs. *Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372; *Bockhop* vs. *Phoenix Transit Co.* (N. J.), 117 Atl. 624; *Southern Surety Co.* vs. *Stubbs* (Tex.), 199 S. W. 343; *Travelers Insurance Co.* vs. *Bacon* (Ga.), 119 S. E. 458; *West* vs. *Kozer* (Ore.), 206 Pac. 542.

The parties to a maritime contract may in general specify in their contract the law which shall determine their rights and liabilities under it. *Grant*

Smith-Porter Ship Co. vs. *Rohde, supra; Union Fish Co.* vs. *Erickson,* 248 U. S. 308, 313; *Watts* vs. *Camors,* 115 U. S. 353, 362.

This is but an expression of general law.

> "As construed by the court, this section is the recognition of a principle of universal law; the principle that in every *forum* a contract is governed by the law with a view to which it was made." Mr. Chief Justice Marshall in *Wayman* vs. *Southard,* 10 Wheat. 1, 48.

Also to the same effect:

> "Where the parties have expressly provided that the contract shall be governed by the law of a particular country, this intention will as a rule be carried out by the courts, and a party is bound by his choice. 'Parties may substitute the laws of another place or country, than that where the contract is entered into, both in relation to the legality and extent of the original obligation, and in relation to the respective rights of the parties, for a breach or violation of its terms.' This is part of the *jus gentium,* and is enforced *ex comitate,* when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of the contract." 13 Corpus Juris, p. 251.

A right to benefits under an elective workmen's compensation act is contractual and a suit to enforce such benefits is a suit upon contract.

Kennerson vs. *Thames Towboat Co.,* 89 Conn. 367, 94 Atl. 372;

Berry vs. *Donovan & Sons,* 120 Me. 457, 115 Atl. 250;

Hunter vs. *Colfax Consolidated Coal Co.* (Minn.), 154 N. W. 1037, 157 N. W. 145;

Pierce vs. *Bekins Van & Storage Co.,* 185 Iowa 1346, 172 N. W. 191;

Grinnell vs. *Wilkinson,* 39 R. I. 447, 98 Atl. 103;

Crane vs. *Leonard* (Mich.), 183 N. W. 204;

Post vs. *Burger & Gohlke,* 216 N. Y. 544, 111 N. E. 351.

Therefore suit to enforce such elective compensation act in maritime cases may be brought in the state tribunals, at least concurrently with the federal courts, under the original "saving clause" as adopted in 1789 (Secs. 24 and 256, Judicial Code, as originally enacted).

Kennerson vs. *Thames Towboat Co.,* 89 Conn. 367, 94 Atl. 372;

Southern Surety Co. vs. *Stubbs* (Tex.), 199 S. W. 343;

Berry vs. *Donovan & Sons,* 120 Me. 457, 115 Atl. 250.

In the *Kennerson* case, it is said:

"The contract in question (*i. e.,* of employment) may be assumed to be a maritime one. That would give the admiralty court the right to take jurisdiction over it. It could not take from our courts jurisdiction over a contract made in Connecticut by citizens of Connecticut, nor prevent its enforcement wherever it is operative by the procedure of the state of its origin. This contract is to be interpreted and enforced by the

application of the same principles accorded any contract. * * * Plainly this proceeding is a personal action, and not one *in rem*. The admiralty court has not exclusive jurisdiction. *Knapp, Stone and Co.* vs. *McCaffrey*, 177 U. S. 638, 643; *Schoonmaker* vs. *Gilmore*, 102 U. S. 118; *Leon* vs. *Galceran*, 11 Wall. 185; *The Belfast*, 7 Wall. 624; *The Hine* vs. *Trevor*, 4 Wall. 555, 567, 568; *Manchester* vs. *Massachusetts*, 139 U. S. 240."

The decision of this court in *Grant Smith-Porter Ship Co.* vs. *Rohde, supra*, was also taken by the lower court to imply this result, as a subsequent suit by Rohde under the Oregon Compensation Act was held within the jurisdiction of the Oregon Industrial Commission in *Rohde* vs. *State Industrial Accident Commission*, 217 Pac. 627.

The two acts of congress pronounced unconstitutional in *Knickerbocker Ice Co.* vs. *Stewart*, 253 U. S. 149, and in the instant case (act of October 6, 1917; act of June 10, 1922), each amending sections 24 and 256, Judicial Code, also retain sufficient effectiveness to sanction a concurrent jurisdiction in the state tribunals to enforce an elective compensation act concurrently with the federal courts, where the state act may constitutionally prescribe the substantive law of the case.

The only substantial contention made by defendants in error in opposition to our position is one relating to the mode of election prescribed by the California act and its application to the facts of the case at bar. The California act is compulsory as to

most industrial occupations and elective as to all others (section 70, California Compensation Act), which necessarily includes maritime employments, as they are not within the compulsory features. *Southern Pacific Co.* vs. *Jensen,* 244 U. S. 205. The provisions of the California act, fixing the mode for accepting its provisions as an elective statute, are printed in the footnote.

The alternative method emphasized in the italicized portions of the section is the one followed in the present case. Defendant in error James Rolph Company, the employer, procured from defendant in error General Accident, Fire and Life Assurance Corporation, Limited, the insurer, a policy of workmen's compensation insurance covering all its employees and specifically including its stevedoring operations without any exclusion of injuries occurring upon water. The policy covered the work per-

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SEC. 70. (*a*) Any employer, having in his employment any employee not included within the term "employee" as defined by section eight of this act or not entitled to compensation under this act, and any such employee, may, by their joint election, elect to come under the compensation provisions of this act in the manner hereinafter provided.

(*b*) Such election on the part of the employer shall be made by filing with the commission a written statement to the effect that he accepts the compensation provisions of this act, which, when filed, shall operate, within the meaning of section six of this act, to subject him to the compensation provisions thereof, and of all acts amendatory thereof, for the term of one year from the date of filing, and thereafter without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or succeeding year, file in the office of the commission a notice in writing that he withdraws his election. Such acceptance shall be held to include employees whose employment is both casual and not in the course of the trade, business, profession or occupation of the employer, unless expressly excluded therefrom. *In case any employer is insured against liability for compensation under this act, he shall be deemed to have so elected during the period that such policy shall remain in force, without filing such written notice with the commission, as to all classes of employees covered by such policy of insurance, anything in this act to the contrary notwithstanding.*

(*c*) Any employee in the service of any employer who has made an election in either of the modes above prescribed, shall be deemed to have

formed by the deceased employee, Hayes, at the time of his injury and was in full force and effect at said time. (See stipulation of defendants in error, page 89 of the record, third paragraph from the bottom of the page.) Defendants in error have therefore carried out the mode of election prescribed in the italicized portion of the section.

Defendants in error claim that the policy of insurance in question contained a separate provision insuring the employer against liability under the general law, including maritime law, and that the policy and state statute should therefore be construed to hold that the compensation insurance applied only to injuries occurring upon the land and the insurance under the maritime law to injuries occurring upon the vessel. We did not fully answer

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accepted, and shall, within the meaning of section six of this act, be subject to the compensation provisions of this act, and of any act amendatory thereof, if, at the time of the injury for which liability is claimed:

(1) The employer charged with such liability is subject to the compensation provisions of this act, whether the employee has actual notice thereof or not; and

(2) Such employee shall not, at the time of entering into the employment, have given to his employer notice in writing that he elects not to be subject to the compensation provisions of this act; or, in the event that such employment was entered into in advance of the election by the employer, such employee shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving either of such notices shall have remained in the service of such employer for five days after the employer has filed his election, in which case the time at which the employee becomes subject to said compensation provisions shall be deemed to be at the beginning of said period.

(*d*) The state, and all political or other subdivisions thereof, as defined in section seven, and all state institutions, shall be conclusively presumed to have elected to come within the provisions of this act as to all employments otherwise excluded from this act.

(*e*) All written acceptances filed by employers with the commission prior to the taking effect of this act, accepting the provisions of the workmen's compensation, insurance and safety act, chapter one hundred seventy-six, statutes of 1913, and all acts amendatory thereof, shall, unless written notice be given to the contrary by said employer within sixty days after the taking effect of this act, be deemed acceptances of the provisions of this act, and all acts amendatory thereof, in accordance with the provisions of this section.

this contention in our brief to this court because we believed and still believe that it involves only a question of construction of evidence and construction of the state statute, on which the determination of the highest court of the state is accepted by this court. The Supreme Court of California did not pass upon this contention directly for the reason indicated in the following excerpt from its opinion (quoted from page 13 of the record):

> "At the time this petition was filed, there was pending in this court two proceedings in *certiorari* which have since been decided, and which dispose of the issues raised by this petition and the four answering contentions of the respondent just stated. (*Alaska Packers Association* vs. *I. A. C. and J. Hansen*, 66 Cal. Dec. 273, and *Zurich General Accident, etc. Co.* vs. *I. A. C. and Jenny A. Denny*, 66 Cal. Dec. 277.) Because time for a rehearing had not elapsed when the (fol. 33) respondent commission filed its answer in this matter, it reasserted its contentions one and two referred to. * * * We are satisfied with the conclusions reached and announced in the *Alaska Packers* case and in the *Zurich* case, *supra*. They satisfactorily dispose of the contentions thus far noted in this proceeding."

In the *Zurich* case referred to in the excerpt, however, the California Supreme Court said upon this contention:

> "Assuming that the act of taking out such a policy of insurance ordinarily may have the effect of bringing the employer under the work-

men's compensation provisions of this act, as provided, it can not of itself confer jurisdiction upon the commission, where, as in this case, exclusive jurisdiction of the matter in controversy is vested in the admiralty courts."

Zurich etc. Co. vs. *Industrial Accident Commission of California*, 218 Pac. 563.

The lower court, therefore, decided that the insurance policy fully met the requirements of section 70 of the California statute for an election, at least for the purpose of this decision. This court will therefore probably limit this consideration to the federal question of whether the constitution and maritime law forbid the application of an elective statute to a maritime employment. The Supreme Court of California, upon receiving the guidance of this court upon this question, can then construe the state statute and insurance policy further if it is so required.

If, however, this court desires to itself construe the policy and state statute, we respectfully submit the following considerations:

(1) The insurance policy, set out on pages 18 to 22 of the record, nowhere apportions liability for injuries occurring upon land to the compensation act and those occurring upon water to the special endorsement. Each form of insurance is coextensive with the entire scope of the policy as its application may appear. To illustrate: If the act of congress of June 10, 1922, had been pronounced valid instead of void in the instant case, the workmen's compensation portion of the policy would have

covered the employer's loss, under the stipulation quoted in the next paragraph.

(2) The claimed construction is inconsistent with the stipulation by the defendants in error before the State Industrial Accident Commission, which reads as follows (rec. p. 8):

> "(2) That at the said time the General Accident and Life Insurance Company, was the insurance carrier for the defendant employer and is liable for any compensation herein awarded."

(3) The California statute, as appears from the language of section 70 quoted in the footnote, does not exempt so-called "double coverage" policies, such as the one involved in this case, from the legal effect of an election. It pronounces every policy insuring against liability under the Workmen's Compensation Act an election to the extent of the scope of the compensation policy of other insurance protection given therein.

Erie R. R. Co. vs. *Winfield*, 244 U. S. 170, should be mentioned, but is clearly distinguishable. In this case, the Erie Railroad Company was held not to have elected to come under the New York Compensation Act to the exclusion of the Federal Employers' Liability Act, under a provision of the state law by which failure to disaffirm the state law was conclusively presumed to be an election. Naturally, the state can not force the holder of a federal privilege to a disaffirmance. This does not imply, however, that the holder of the federal privilege may not voluntarily and expressly contract, or what is

the same thing, voluntarily and expressly do the act pronounced an affirmative election by the state law, and thereby come under its provisions. In the present case, the employer, knowing the law as it must be presumed to do, took out a policy of workmen's compensation insurance upon its entire stevedoring operation on land and water. The insurer knowingly issued such a policy. The policy could have no meaning as to insurance of injuries occurring upon the water except as an election under the state law. This law is expressly incorporated in the policy as part of the terms thereof (rec. pages 18–19). It does not lie in the mouths of the defendants in error to claim that their act does not have the legal effect given it by the terms of their own contract.

Wherefore plaintiffs in error respectfully pray this court to grant a rehearing of its decision entered in this matter February 25 of the present term, and proceed to pass upon the two issues stated above, and thereafter to hold that the State Workmen's Compensation Act is applicable under the facts of the present case, both because of the fact that this proceeding involves a fatal injury and because the state statute is applicable as an elective statute, and to reverse the decision of the court below upon said issues.

Respectfully submitted.

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